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*Attorneys for Defendants BAC Home
Loans Servicing, LP, incorrectly sued as
Bank of America Home Loans Servicing, LP;
ReconTrust Company, N.A., incorrectly sued
as ReconTrust Company; Mortgage Electronic
Registration Systems, Inc.; and MERSCORP, Inc.*

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

Mark A. Adair, an individual,

Plaintiff,

Case No.: 2:11-cv-00519-GMN -RJJ

MOTION TO DISMISS

v.

BANK OF AMERICA HOME LOANS
SERVICING, LP; RECONTRUST CO.;
MERSCORP, INC., a Virginia Corporation,
MORTGAGE ELECTRONIC REGISTRATION
SYSTEMS, INC., a subsidiary of MERSCORP,
Inc., a Delaware corporation; AND DOES I
individuals 1 to 100, Inclusive; and ROES
Corporations 1 to 30, Inclusive; and all other
persons and entities unknown claiming any right,
title, estate, lien or interest in the real property
described in the Complaint adverse to Plaintiff's
ownership, or any cloud upon Plaintiff's title
thereto,

Defendants.

Defendants BAC Home Loans Servicing, LP, incorrectly sued as Bank of America Home

Loans Servicing, LP ("BAC"); ReconTrust Company, N.A., incorrectly sued as ReconTrust Co. ("ReconTrust"); Mortgage Electronic Registration Systems, Inc. ("MERS"); and MERSCORP, Inc. ("MERSCORP" and, collectively with BAC, ReconTrust and MERS, "BAC Defendants") move pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss Plaintiff Mark A. Adair's Complaint. This Motion is based on the pleadings and papers on file herein, the Memorandum of Points and Authorities below, and any oral argument this Court should entertain.

MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

This is yet another lawsuit in which a defaulting borrower attempts to avoid the consequences of his failure to fulfill his loan obligations. In this case, Plaintiff alleges that the Defendants fraudulently induced him into his loan and were unjustly enriched as a result. In addition, Plaintiff alleges a nebulous industry-wide conspiracy to make fraudulent loans, as well as a conspiracy related to use of the MERS system. Further, Plaintiff contends that BAC Defendants lack standing to foreclose and that BAC Defendants wrongfully denied him for a loan modification.

Plaintiff's causes of action fail to state a claim upon which relief can be granted, or are based on inapplicable statutes or duties that do not exist under Nevada law. In particular, many of Plaintiff's claims are barred by the applicable statutes of limitations, are improperly pled, or relate to alleged wrongdoing at origination, before any of the BAC Defendants was involved with the subject loan.

This Court has already rejected similar allegations and claims in *Lopez v. Exec. Trustee Servs.*, Case No. 3:09-cv-180, slip op. (D. Nev. Jan. 13, 2010) (attached hereto as **Exhibit A**); *Goodwin v. Exec. Trustee Servs.*, 3:09-cv-00306-ECR, slip op. (D. Nev. Dec. 2, 2010) (attached hereto as **Exhibit B**); *Green et al. v. Countrywide Home Loans, Inc., et al.*, No. 3:09-cv-00374-BES, slip op. (D. Nev. July 30, 2010) (attached hereto as **Exhibit C**); *Dalton, et al. v. Countrywide Financial Servs., Inc. et al.*, No. 3:09-cv-00534-LDG-VPC, slip op. (D. Nev. Jan. 21, 2011) (attached hereto as **Exhibit D**); *Duncan v. Countrywide Home Loans, Inc.*, No. 3:09-cv-00632-R CJ-

VPC, slip op. (D. Nev. Dec. 28, 2010) (attached hereto as **Exhibit E**); *Sieben v. Countrywide Home Loans, Inc.*, No. 3:09-cv-00642-RCJ-VPC, slip op. (D. Nev. Dec. 28, 2010) (attached hereto as **Exhibit F**); and *Hearne v. Countrywide Home Loans, Inc.*, 3:08-CV-0500-ECR-RAM, 2010 WL 1815424 (D. Nev. Apr. 30, 2010). Judge James A. Teilborg of the District of Arizona, who presides over the multi-district litigation proceeding dealing with these matters, has also rejected similar claims in related cases. *See In re Mortg. Elec. Registration Sys. (MERS) Litig.*, No. 2:09-MD-02119-JAT, 2011 WL 251453, at *5 (D. Ariz. Jan. 25, 2011); *In re Mortg. Elec. Registration Sys. (MERS) Litig.*, No. 2:09-MD-02119-JAT, 2010 WL 4038788, at *8 (D. Ariz. Sept. 30, 2010); *Cervantes v. Countrywide Home Loans, Inc.*, No. CV 09-517-PHX-JAT, 2009 WL 3157160 (D. Ariz. Sept. 24, 2009), appeal pending, No. 09-17364; and *Ciardi v. Lending Co., Inc.*, No. CV 10-0275-PHX-JAT, 2010 WL 2079735 (D. Ariz. May 24, 2010). This Court should not reach a different result here.

II.

STATEMENT OF FACTS

A. Plaintiff Borrowed \$570,000.00 from GreenPoint Mortgage Funding, Inc. and Secured the Loan with a Deed of Trust

On March 12, 2001, Plaintiff purchased the vacant property located at 1401 Marbella Ridge Court, Las Vegas, Nevada 89117, Parcel No. 163-03-213-007. *See Grant, Bargain, Sale Deed, Exhibit G.*¹ Subsequently, on January 16, 2002, Plaintiff borrowed \$325,000.00 from Washington Mutual Bank, FA to erect improvements on the property. *See 2002 Deed of Trust, Exhibit H.* Plaintiff secured the \$325,000.00 loan with a deed of trust encumbering the property. *See id.*

The next year, on September 18, 2003, Plaintiff refinanced the property by obtaining a 320,000.00 loan from Independent Realty Capital Corporation. *See 2003 Deed of Trust, Exhibit I.* Plaintiff secured the \$320,000.00 loan with a deed of trust against the property. *See id.* A few

¹ BAC Defendants respectfully request judicial notice of the attached deed, deeds of trust and foreclosure notices. *See Exhibits G-Q.* Under Federal Rule of Evidence 201, a court may judicially notice matters of public record. *Mack v. S. Bay Beer Distrib.*, 798 F.2d 1279, 1282 (9th Cir. 1986), abrogated on other grounds by *Astoria Federal Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104 (1991). The deed, deeds of trust, and foreclosure notices should be judicially noticed because they are of public record in the Clark County Recorder's office.

1 weeks later, on October 6, 2003, Plaintiff also obtained a \$50,000.00 line of credit from Independent
 2 Realty Capital Corporation. *See* 2003 Deed of Trust (Line of Credit), **Exhibit J**. The \$50,000.00
 3 line of credit was secured by a second position deed of trust encumbering the property. *See id.*

4 On May 13, 2004, Plaintiff again refinanced, this time by obtaining a \$570,000.00 loan from
 5 GreenPoint Mortgage Funding, Inc. *See* Foreclosing Deed of Trust, **Exhibit K**.² The \$570,000.00
 6 loan was secured by a deed of trust ("Foreclosing Deed of Trust") against the property. *See id.* Also
 7 on May 13, 2004, Plaintiff obtained a \$190,000.00 Home Equity Line of Credit from GreenPoint
 8 Mortgage Funding, Inc. *See* 2004 HELOC, **Exhibit L**. The \$190,000.00 Home Equity Line of
 9 Credit was secured by a second position deed of trust encumbering the property. *See id.*

10 The Foreclosing Deed of Trust lists MERS as the beneficiary and nominee of the lender. *See*
 11 Ex. K, p. 2. The Foreclosing Deed of Trust also states:

12 Borrower understands and agrees that MERS holds only legal title to
 13 the interests granted by Borrower in this Security Instrument, but, if
 14 necessary to comply with law or custom, MERS (as nominee for
 15 Lender and Lender's successor and assigns) has the right: to exercise
 16 any or all of those interests, including, but not limited to, the right to
 foreclose and sell the Property; and to take any action required of
 Lender including, but not limited to, releasing and canceling this
 Security Instrument.

17 Ex. K, p. 3-4. The Foreclosing Deed of Trust permits the lender to appoint a substitute trustee
 18 thereunder. *See Id.* ¶ 24. Further, the Foreclosing Deed of Trust allows the lender to foreclose on
 19 the property if Plaintiff does not make his loan payments. *Id.* ¶ 22. BAC subsequently began
 20 servicing Plaintiff's \$570,000.00 loan.

21 **B. Plaintiff Defaulted on His Loan and BAC Defendants Began Non-Judicial Foreclosure**

22 Plaintiff stopped making his mortgage payments. On March 16, 2010, MERS assigned the
 23 Foreclosing Deed of Trust to GreenPoint Mortgage Funding, LLC. *See* Corporation Assignment of
 24 Deed of Trust Nevada, **Exhibit M**. That same day, GreenPoint Mortgage Funding, LLC substituted
 25 ReconTrust as the trustee under the Foreclosing Deed of Trust. *See* Substitution of Trustee Nevada,
 26 **Exhibit N**. Because of Plaintiff's default, ReconTrust recorded a Notice of Default/Election to Sell

27 ² Plaintiff incorrectly maintains that this document was executed and recorded on August 3, 2006. *See*
 28 Compl., p. 4.

1 under Deed of Trust on March 17, 2010. *See* Notice of Default, **Exhibit O**.

2 In addition to defaulting on his mortgage loan, Plaintiff, upon information and belief, stopped
3 paying his Homeowners' Association assessments. *See* Notice of Lien, **Exhibit P**. Accordingly, on
4 April 20, 2010, Plaintiff's Homeowners' Association recorded a Notice of Delinquent Assessment
5 (Lien) against the property. *See id.*

6 **C. Plaintiff Filed a Deficient Complaint Nearly Seven Years After Signing the Loan**
7 **Documents**

8 On February 7, 2011, Plaintiff filed his Complaint alleging twelve claims for relief that
9 include: (1) Violations of Unfair Lending Practices—NRS 598D; (2) Deceptive Trade Practices; (3)
10 Wrongful Foreclosure; (4) Conspiracy to Commit Fraud and Conversion; (5) Conspiracy to Commit
11 Fraud Related to MERS System; (6) Inspection and Accounting; (7) Unjust Enrichment; (8) Quiet
12 Title; (9) Breach of Good Faith and Fair Dealing; (10) Injunctive Relief; (11) Declaratory Relief;
13 and (12) Rescission. On February 28, 2011, Plaintiff also recorded a *lis pendens* on the property
14 (Clark County Recorder, Doc. No. 201102280001513). *See* Notice of Lis Pendens, **Exhibit Q**.

15 Plaintiff's claims either fail as a matter of law or warrant dismissal. Indeed, the Complaint
16 fails to plead sufficient factual allegations to establish the necessary elements of the claims against
17 BAC Defendants. The Court should dismiss the Complaint pursuant to Fed. R. Civ. P. 12(b)(6) for
18 failure to state a claim upon which relief can be granted.

19 **III.**

20 **LEGAL STANDARD**

21 The standard of review applicable to a motion to dismiss under Rule 12(b)(6) is familiar;
22 however, the Supreme Court has clarified the standard in significant ways. Rule 8(a)(2) requires that
23 the complaint contain a "short and plain statement of the claim showing that the pleader is entitled to
24 relief." *See* Fed. R. Civ. P. 8(a)(2). According to the Supreme Court in *Ashcroft v. Iqbal*, 129 S.Ct.
25 1937 (2009), "the pleading standard Rule 8 announces does not require 'detailed factual allegations,'
26 but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* at
27 1949 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). "A pleading that offers 'labels
28

1 and conclusions' or 'a formulaic recitation' of the elements of a cause of action will not do." *Id.*
 2 (quoting *Twombly*, 550 U.S. at 555).

3 A complaint does not "suffice if it tenders 'naked assertion[s]' devoid of 'further factual
 4 enhancement.'" *Id.* (quoting *Twombly*, 550 U.S. at 557). To "survive a motion to dismiss, a
 5 complaint must contain sufficient factual matter, accepted as true, to 'state a claim for relief that is
 6 plausible on its face.'" *Id.* (quoting *Twombly*, 550 U.S. at 555). "[O]nly a complaint that states a
 7 plausible claim for relief survives a motion to dismiss." *Id.* (quoting *Twombly*, 550 U.S. at 556).
 8 Factual allegations are assumed true, but the court is "not bound to accept as true a legal conclusion
 9 couched as a factual allegation." *Id.* at 1949-50 (quoting *Twombly*, 550 U.S. at 555); *see also Clegg*
 10 *v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994).

11 IV.

12 LEGAL ARGUMENT

13 A. MERSCORP Is Improperly Named as a Defendant

14 MERSCORP is MERS' corporate parent. *Trevino v. Merscorp, Inc.*, 583 F. Supp. 2d 521,
 15 524 (D.Del. 2008). MERSCORP was uninvolved in the subject loan transaction and is not the
 16 beneficiary under the Foreclosing Deed of Trust. Accordingly, MERSCORP is not a proper party to
 17 this lawsuit.

18 To hold MERSCORP liable for the acts of MERS, Plaintiff would have to "pierce the
 19 corporate veil." "It is a general principle of corporate law deeply 'ingrained in our economic and
 20 legal systems' that a parent corporation (so-called because of control through ownership of another
 21 corporation's stock) is not liable for the acts of its subsidiaries." *United States v. Bestfoods*, 524 U.S.
 22 51, 61 (1998) (citations omitted). Nevertheless, "the corporate veil may be pierced and the
 23 shareholder liable for the corporation's conduct when, *inter alia*, the corporate form would otherwise
 24 be misused to accomplish certain wrongful purposes." *Id.* at 62 (citations omitted). The elements of
 25 veil piercing in Nevada are: (1) the corporation is influenced and governed by the stockholder
 26 asserted to be its alter ego; (2) there is such unity of interest and ownership that the corporation and
 27 the stockholder are inseparable from each other; and (3) adherence to the corporate fiction of a
 28

1 separate entity would sanction fraud or promote a manifest injustice. *Basic Mgmt. Inc. v. United*
 2 *States*, 569 F. Supp. 2d 1106, 1117 (D. Nev. 2008) (citing Nev. Rev. Stat. § 78.747).

3 Plaintiff's Complaint neither addresses nor establishes any of the relevant elements needed to
 4 pierce the corporate veil, nor could it. MERSCORP is not a proper party to this litigation and should
 5 be dismissed.

6 **B. Plaintiff's Unfair Lending Practices Act Claim Fails as a Matter of Law against BAC**
 7 **Defendants for Multiple Reasons**

8 **1. Plaintiff's ULPA Claim is Time-Barred**

9 Plaintiff's First Cause of Action alleges a violation of the Unfair Lending Practices Act, NRS
 10 Ch. 598D (the "ULPA"). The statute of limitations for a ULPA claim is three years. *See* NRS §
 11 11.190(3)(a) (actions for liability founded upon a statute are subject to a three-year statute of
 12 limitations). Plaintiff signed his loan documents in May of 2004, at which point Plaintiff was in
 13 possession of the facts giving rise to the asserted cause of action. Under the applicable 2003 version
 14 of the ULPA, a lender committed an unfair lending practice by approving a loan based solely on the
 15 equity in the property without considering the borrower's ability to repay. Plaintiff would have
 16 known prior to closing whether he provided documents confirming assets, liabilities, income and
 17 employment. The Complaint fails to provide any basis to conclude Plaintiff could not reasonably
 18 have discovered the alleged violation in May of 2004. Plaintiff waited until February 7, 2011 to file
 19 this Complaint, nearly seven years later. Plaintiff's First Cause of Action is time-barred.

20 **2. BAC Defendants Did Not Originate Plaintiff's Loan**

21 As set forth above, Plaintiff's ULPA claim is time-barred. Even if it were not, this claim fails
 22 as a matter of law against BAC Defendants. The ULPA mainly deals with potential wrongdoing at
 23 the time the loan was originated. In fact, the applicable 2003 version of the ULPA made it unlawful
 24 to:

25 Knowingly or intentionally make a home loan to a borrower based
 26 solely upon the equity of the borrower in the home property and
 27 without determining that the borrower has the ability to repay the
 28 home loan from other assets, including, without limitation, income.

None of the BAC Defendants was involved with originating Plaintiff's loan—the original

1 lender was GreenPoint Mortgage Funding, Inc. Moreover, Plaintiff does not allege that the BAC
 2 Defendants violated any other provisions of NRS §598D(1). He does not allege that the BAC
 3 Defendants required him to provide property insurance in an amount that exceeds the reasonable
 4 replacement value of the improvements. *See* Compl. ¶¶ 31-35. Similarly, he does not allege that the
 5 BAC Defendants financed a prepayment fee or penalty in a refinance transaction or that BAC
 6 Defendants financed any credit insurance. *See id.* The allegations Plaintiff does include against the
 7 BAC Defendants are simply not violations of the ULPA. *See id.* Thus, Plaintiff fails to state a
 8 ULPA claim against the BAC Defendants.

9 **3. The 2003 ULPA Applied Only to High Cost, Refinance Loans, And Is Therefore** 10 **Inapplicable**

11 Plaintiff's ULPA claim also fails because Plaintiff's loan is not subject to the statute. The
 12 2003 version of the ULPA, which applies to Plaintiff's 2004 loan, defined a "home loan" as a
 13 "consumer credit transaction" that (1) "is secured by a mortgage loan which involves real property
 14 located within [Nevada]" and (2) "[c]onstitutes a mortgage under §152 of the Home Ownership and
 15 Equity Protection Act of 1994" ("HOEPA") and the regulations adopted pursuant to HOEPA,
 16 including 12 C.F.R. §226.32. NRS § 598D.040 (2005).

17 Plaintiff's loan was not a "home loan" under the 2003 ULPA unless it was a "mortgage"
 18 under HOEPA. HOEPA's definition of "mortgage" is very limited and includes only certain
 19 specialized loans. Section 152 of HOEPA defines a "mortgage" in pertinent part as "a consumer
 20 credit transaction that is secured by the consumer's principal dwelling, other than a residential
 21 mortgage transaction . . ." in which either "the annual percentage rate at consummation of the
 22 transaction will exceed by more than 10 percentage points the yield on Treasury securities having
 23 comparable periods of maturity on the fifteenth day of the month immediately preceding the month
 24 in which the application for the extension of credit is received by the creditor" or "the total point and
 25 fees payable by the consumer at or before the closing will exceed the greater of (i) 8 percent of the
 26 total loan amount; or (ii) \$400." 15 U.S.C. §1602 (aa)(1); 12 C.F.R. §226.32(a)(1). A "residential
 27 mortgage transaction" is "a transaction in which a . . . deed of trust . . . is created or retained in the
 28

consumer's principal dwelling to finance the acquisition or initial construction of that dwelling." Reg. Z §226.2(a)(24).

Plaintiff baldly asserts that his loan was a "home loan" under NRS 598D. *See* Compl., ¶ 29. Plaintiff's conclusory assertion that his loan is governed by the ULPA is exactly the type of pleading the Supreme Court disapproved in *Iqbal*. *See Iqbal*, 129 S. Ct. 1949-50 (conclusory allegations not entitled to presumption of truth). This is fatal to Plaintiff's ULPA claim because the ULPA's 2007 amendment, which expanded the scope of the ULPA, cannot be applied retroactively. *See U.S. v. Perry*, 431 F.2d 1020, 1023 (9th Cir. 1970) (statutes are presumed to operate only prospectively). In *Velasquez v. HSBC Mortgage Servs.*, this Court held that a case commenced in 2009 based on a 2005 loan was subject to the law as it existed in 2005, not as amended in 2007. Case No. 2:09-cv-784-KJD-LRL, 2009 WL 2338852, at *3-4 (D. Nev. July 24, 2009). It held the 2005 language applied, and dismissed the claim because the loan was not within the statute when originated. *Id.* at *4; *accord Aguilar v. WMC Mtg. Corp.*, Case No. 2:09-cv-1416-ECR-PAL, 2010 WL 185951, at *5-6 (D. Nev. Jan. 15, 2010). The Court should follow its precedents by dismissing Plaintiff's ULPA claim.

C. Plaintiff's Unfair Trade Practices Claim Fails as a Matter of Law

Plaintiff's Second Cause of Action is for "Deceptive Trade Practices." In particular, Plaintiff asserts that the BAC Defendants violated NRS §§ 598.0923 (1) and (3). These provisions provide:

A person engages in a 'deceptive trade practice' when in the course of his or her business or occupation he or she knowingly:

1. Conducts the business or occupation without all required state, county or city licenses.

...

3. Violates a state or federal statute or regulation relating to the sale or lease of goods or services.

Plaintiff does not identify what licenses the BAC Defendants allegedly failed to obtain. Plaintiff also does not explain what action by the BAC Defendants is related to "the sale or lease of goods or services" as required for NRS § 598.0923 (3) to apply.³ None of the allegations in the

³ Plaintiff does not allege any conduct that would violate NRS §§ 598.0923 (1) and (3). Rather, Plaintiff alleges that he did not receive notice that the loan could be assigned, sold, or transferred, and that improper fees and

Complaint even suggest that the BAC Defendants sold or leased goods or services to Plaintiff. Plaintiff's Second Cause of Action fails because NRS §§ 598.0923 (1) and (3) do not apply to non-judicial foreclosure of Plaintiff's real property.

D. Plaintiff's Wrongful Foreclosure Claim Fails Because There Is no Completed Sale, Plaintiff Breached the Loan Agreement, and Plaintiff Has Not Complied With The Tender Rule

Plaintiff's wrongful foreclosure claim fails because it does not allege a foreclosure sale or that Plaintiff was not in default. *See* Compl., ¶¶ 45-49. To succeed on a claim for wrongful foreclosure, Plaintiff must show that (1) BAC Defendants exercised a power of sale or foreclosed on Plaintiff's property and (2) at the time the power of sale was exercised, there was no breach of condition or failure of performance by Plaintiff that would have authorized the foreclosure or exercise of power of sale.⁴ *Collins v. Union Fed. Sav. & Loan Ass'n*, 99 Nev. 284, 304, 662 P.2d 610, 623 (1983). Plaintiff's Complaint necessarily fails under this standard, as the power of sale has not been exercised against the property in this case, and Plaintiff cannot show that he has not breached the loan contract.

1. Plaintiff's Claim Is Premature as no Foreclosure Sale Has Occurred

Initially, it is axiomatic under Nevada law that the tort of wrongful foreclosure is available only when "the power of sale was exercised" and a "foreclosure occurred." *See Haley v. Elegen Home Lending, LP*, Case No. 3:10-cv-00046-LRH-RAM, 2010 WL 1006664, at *1-2 (D. Nev. Mar.

kickbacks were paid in connection with settlement of the loan. *See* Compl. p. 8-9. In making these claims, Plaintiff appears to be arguing that Defendants violated 12 U.S.C. §§ 2605(a) and 2607(a), respectively. These claims, which arise under the federal Real Estate Settlement Procedures Act ("RESPA"), cannot be asserted against the BAC Defendants, as they both relate to alleged violations at closing, and no BAC Defendant was involved in the loan until well after closing. Moreover, even if Plaintiff had properly pled a RESPA claim and could allege any settlement or closing violations against the BAC Defendants, that claim would be time-barred. Indeed, claims under 12 U.S.C. § 2605 must be brought within three (3) years of the alleged violation, and claims under 12 U.S.C. § 2607 must be brought within one (1) year of the alleged violation. *See* 12 U.S.C. § 2614. Plaintiff's loan was originated nearly seven (7) years before he commenced this action. Thus, even if he had or could state a RESPA claim, that claim would be barred by the statute of limitations.

⁴ *See also Cilluffo v. Wash. Mutual*, Case No. C09-02518 HRL, 2010 WL 431896, at *3 (N.D. Cal. Feb. 2, 2010) ("Claims for wrongful foreclosure have been found premature where there has . . . not yet been a sale."); *Santos v. Countrywide Home Loans, Inc.*, Case No. Civ. 2:09-02642 WBS DAD, 2009 WL 3756337, at *3 (E.D. Cal. Nov. 6, 2009) (noting that "there is no cause of action for 'wrongful threatened foreclosure'"); *Swanson v. EMC Mortg. Corp.*, Case No. CV F-09-1507 LJO DLB, 2009 WL 3627925, at *12 (E.D. Cal. Oct. 29, 2009) ("In the absence of a foreclosure sale, [defendants] cannot be liable for 'wrongful foreclosure.'"); *Vega v. JPMorgan Chase Bank, N.A.*, 654 F. Supp. 2d 1104, 1113 (E.D. Ca. 2009).

16, 2010) ("A claim for wrongful foreclosure does not arise until the power of sale is exercised."). Plaintiff has not alleged that a foreclosure sale has occurred on the property. Thus, Plaintiff's wrongful foreclosure claim is premature and fails because speculative future acts cannot form the predicate of an actual case or controversy for adjudication.⁵

2. Plaintiff Additionally Fails To Allege Absence of a Default in Loan Payments

A wrongful foreclosure action will not lie in Nevada unless the plaintiff pleads that "no breach of condition or failure of performance existed on the mortgagor's or trustor's part which would have authorized the foreclosure or exercise of the power of sale." *Collins*, 99 Nev. at 304, 662 P.2d at 623. Thus, the "material issue" in a wrongful foreclosure claim is whether "the trustor was in default when the power of sale was exercised," and wrongful foreclosure claims have therefore been dismissed when plaintiffs fail to allege that they do not owe money on their loan, *i.e.*, that they were not "in default when the power of sale was exercised." *Collins*, 99 Nev. at 304, 662 P.2d at 623; *see also Haley*, 2010 WL 1006664, at *1-2 (noting that "[a]n action for wrongful foreclosure requires that, at the time of the foreclosure sale, the plaintiff was not in breach of the mortgage contract"); *Aguilar*, 2010 WL 185951, at *2 (dismissing claim because plaintiffs "admit[ted] that they were delinquent"); *Larson v. Homecomings Fin., LLC*, Case No. 2:09-cv-01015-RLH-GWF, 2009 WL 5538536, at *5 (D. Nev. Sept. 1, 2009) (same); *Spracklin v. CR Title Co.*, Case No. 3:10-cv-267-RCJ-VPC, slip op. at 4 ("Under Nevada law, Plaintiff cannot sustain a cause of action for wrongful foreclosure is [sic] the Plaintiff is in default.") (attached at **Exhibit R**).⁶

This same claim was rejected by this Court in *Green v. Countrywide Home Loans, Inc.* *See* Case No. 3:09-cv-374, slip op. at 4 (D. Nev. Jan. 12, 2010) (holding that plaintiffs failed to state a claim for wrongful foreclosure because they failed to allege that they were not in default on their

⁵ *See Buzz Stew, LLC, v. City of N. Las Vegas*, 181 P.3d 670, 674 (2008) (citing *Doe v. Bryan*, 102 Nev. 523, 525, 728 P.2d 443, 444 (1986)).

⁶ *See also Ernestberg v. Mortg. Investors Group*, Case No. 2:08-cv-1304-RCJ-RJJ, 2009 WL 160241, at *6 (D. Nev. Jan. 22, 2009) ("Plaintiff does not contest that he defaulted on the loan"); *Coward v. First Magnus Financial Corp.*, Case No. 2:09-cv-01143-RCJ-GWF, 2009 WL 3367398, at *9 (D. Nev. Oct. 14, 2009) ("Plaintiff has admitted default"); *see also Labra v. Cal-Western Reconveyance Corp.*, Case No. C 09-2537 PJH, 2010 WL 889537, at *9 (N.D. Cal. Mar. 11, 2010) (dismissing wrongful foreclosure claim because Plaintiffs did not fulfill their obligations under deeds of trust by making timely payments); *Roque v. SunTrust Mortg. Inc.*, Case No. C-09-00040 RMW, 2010 WL 546896, at *4 (N.D. Cal. Feb. 10, 2010) (dismissing wrongful foreclosure claim because plaintiff was "unable to assert that no breach of performance occurred").

loans when foreclosure began). Here, as in *Green*, Plaintiff does not—and cannot—allege he is current on his mortgage payments. Accordingly, his claim for wrongful foreclosure fails as a matter of law. See, e.g., *Coward*, 2009 WL 3367398, at *9. As in *Green*, Plaintiff does not allege facts stating the absence of a default with respect to his loan or affirmatively allege that he has paid according to the loan terms of his promissory note. Plaintiff's wrongful foreclosure claim must therefore be dismissed.⁷

3. Plaintiff Did Not Comply With The Tender Rule

Plaintiff's Third Cause of Action should also be dismissed because Plaintiff has not complied with the tender rule. This rule requires plaintiffs who challenge the validity of a completed foreclosure action to tender the amount due and owing on the secured indebtedness as a prerequisite to maintaining the action.⁸ See *Abdallah v. United Savings Bank*, 43 Cal. App. 4th 1101, 1109 (Cal. Ct. App. 1996) (appellants required to allege tender of the amount of the secured indebtedness to challenge foreclosure sale); *U.S. Cold Storage of Cal. v. Great W. Sav. & Loan Ass'n*, 165 Cal. App. 3d 1214, 1222 (Cal. Ct. App. 1985) (the "law is long-established" that tender of the obligation in full

⁷ In his wrongful foreclosure claim and elsewhere, Plaintiff argues that the BAC Defendants willfully failed to properly review him for the federal Home Affordable Modification Program ("HAMP"). See Compl. p. 9, 16. Even if this allegation were true, which it is not, it does not overcome the fact that no sale has taken place and Plaintiff's wrongful foreclosure claim fails as a matter of law. Moreover, in *Manabat v. Sierra Pacific Mortg. Co., Inc.*, the plaintiff similarly premised her wrongful foreclosure claim on her argument that the defendants violated HAMP. See Case No. CV F 10-1018 LJO JLT, 2010 WL 2574161, slip op. (E.D. Cal. June 25, 2010). In granting MERS' and Chase's Motion to Dismiss, the *Manabat* Court concluded that there is no private right of action under HAMP. See 2010 WL 2574161, slip op. at 11. As least one court in this district has similarly concluded that a borrower does not have standing to sue for an alleged breach of HAMP. *Vasquez v. Bank of America Home Loan*, 2:10-cv-00116-PMP-RJJ, Slip Op. at 2 (D. Nev. Aug. 23, 2010); see also *Benito v. Indymac Mortg. Servs.*, Case No. 2:09-CV-1218-PMP-PAL, 2010 WL 2130648 (D. Nev. May 21, 2010). Similarly, case law in other jurisdictions uniformly holds that borrowers cannot sue participating mortgage servicers on the theory that they are intended beneficiaries under the HAMP participation agreements. See *Burtzos v. Countrywide Home Loans*, Case No. 09-cv-2027, 2010 WL 2196068, at *2 (S.D. Cal. June 1, 2010); *Escobedo v. Countrywide Home Loans, Inc.*, Case No. 09cv1557, 2009 WL 4981618 (S.D. Cal. Dec. 15, 2009); *Mugica v. Aurora Loan Services LLC*, Case No. SACV 09-1086, 2009 WL 3467750, at *3 (C.D. Cal. Oct. 28, 2009); *Kamp v. Aurora Loan Services LLC*, Case No. SACV 09-00844, 2009 WL 3177636, at *4 (C.D. Cal. Oct. 1, 2009) (stating that argument that borrowers have rights under HAMP participation agreements is "nonsensical and baseless."); *Wells Fargo Bank v. Small*, 2010 N.Y. Slip Op. 30424(U) 2010 WL 835462 (N.Y. Sup. Ct. Feb. 16, 2010).

⁸ Although Nevada courts have not explicitly adopted the tender rule, they are likely to adhere to it because it is an outgrowth of the equitable maxim recognized in Nevada that a party seeking equity must do equity, and also because Nevada courts look to California law when Nevada law is silent, *Hiekel v. 268 Ltd.*, 887 F.2d 1089, 1989 (9th Cir. 1989), and California employs the tender rule. Indeed, numerous District Courts within California have recently dismissed wrongful foreclosure claims because of a plaintiff's failure to tender the loan amount. See, e.g., *Labra*, 2010 WL 889537, at *9 (dismissing wrongful foreclosure claim because of Plaintiff's failure to tender); *Somera v. Indymac Fed. Bank FSB*, Case No. 2:09-cv-01947-FCD-DAD, 2010 WL 761221, at *8-9 (E.D. Cal. Mar. 3, 2010) (same).

by a trustor is a "prerequisite to challenge of the foreclosure sale"); *Cagle v. Carlson*, 705 P.2d 1343, 1345 (Ariz. Ct. App. 1985) ("he who seeks equity must do equity;" because plaintiff was "legally and morally indebted" to defendant for the amount the property sold for in foreclosure sale, tender of that amount was a condition precedent to setting aside foreclosure sale) (internal quotation and citation omitted). Plaintiff has not offered to tender to the Court or to the BAC Defendants amounts due and owing on his loan. As a result, he cannot challenge the foreclosure sale and his wrongful foreclosure claim should be dismissed. *See Keen v. Am. Home Mortg. Serv., Inc.*, Case No. Civ. 2-09-01026 FCD, 2009 WL 3380454, at *10-11 (E.D. Cal. Oct. 21, 2009) (plaintiff failed to allege "any facts supporting her ability to tender any payment" and "an immediate ability or willingness to tender payment").⁹

E. Plaintiff Cannot State a Claim for Conspiracy to Commit Fraud and Conversion or Conspiracy to Commit Fraud Related to the MERS System

In his Fourth and Fifth Causes of Action, Plaintiff alleges that lenders and others conspired with each other and MERS to commit fraud by making so called "predatory loans" for which they knew Plaintiff was not qualified, and then used the MERS system in an effort to hide their allegedly illegal conduct and to sell and securitize these loans. *See Compl.*, ¶¶ 51-79 and 121. These claims fail for numerous reasons.

In the familiar case of *Cervantes v. Countrywide Home Loans, Inc.*, the United States District Court for the District of Arizona rejected conspiracy allegations that were virtually identical to those raised here, concluding that they "do not arise to the level of fraud" for multiple reasons. *Cervantes*, No. CV 09-517-PHX-JAT, 2009 WL 3157160, at *11 (D. Ariz. Sept. 24, 2009). In particular, the *Cervantes* Court held that the plaintiffs did not state a tort claim because they had not alleged either (1) that they had been induced to enter into the loans based on any fact or statement or omission about MERS, or (2) that alleged representations or omissions about MERS had caused them to default on their loans. *Id.*, 2009 WL 3157160, at *11. Moreover, the *Cervantes* Court noted that the

⁹ In his wrongful foreclosure claim, Plaintiff also states that he is entitled to damages under 15 USC 1681. However, Plaintiff wholly fails to explain the basis for this assertion or otherwise allege a claim under 15 USC 1681. Under *Twombly*, any purported claim under 15 USC 1681 necessarily fails.

1 plaintiffs' conspiracy claim provided none of the particularized details that are required when such
 2 claims are asserted. *Id.*, at *11 (plaintiffs "ha[d] failed to provide any specific, factual allegations
 3 inferring even a tacit agreement" among the defendants) (citing *Twombly*, 550 U.S. at 564-65).

4 In another recent case decided in January of 2010, Judge Edward Reed dismissed a
 5 conspiracy to commit fraud and conversion claim that contained language similar to that contained
 6 in Plaintiff's Complaint. *See Goodwin*, 3:09-cv-00306-ECR, slip op. at 24 (holding that allegations
 7 of a conspiracy to "deprive Plaintiffs of their property through fraud and misrepresentation that
 8 would result in Plaintiffs entering into loan agreements for which they were ultimately not qualified
 9 and which would eventually result in Plaintiffs' inability to make payments and stay in their homes"
 10 were not pled sufficiently to withstand dismissal.) Here, Plaintiff's conspiracy claims are defective
 11 for the same reasons as those at issue in *Cervantes* and *Goodwin* and must be dismissed.

12 **1. Plaintiff Failed To Plead Conspiracy Properly**

13 Plaintiff's Fourth and Fifth Causes of Action warrant dismissal because they do not allege
 14 sufficient facts to show the existence of any illegal agreement among the BAC Defendants. Civil
 15 conspiracy is a way to hold other parties liable for an underlying tort, not a stand-alone claim. *Paul*
 16 *Steelman Ltd. v. HKS, Inc.*, No. 2:05-cv-01330-BES-RJJ, 2007 WL 295610, at *3 (D. Nev. Jan. 26,
 17 2007) ("Civil conspiracy is not an independent cause of action-it must arise from some underlying
 18 wrong."). In order to establish a claim for conspiracy, Plaintiff must establish the following
 19 elements: (1) BAC Defendants acted in concert; (2) BAC Defendants intended to accomplish an
 20 unlawful objective for the purpose of harming Plaintiff; and (3) Plaintiff sustained damage resulting
 21 from BAC Defendants' acts. *See Consol. Generator-Nevada, Inc. v. Cummins Engine Co.*, 114 Nev.
 22 1340, 971 P.2d 1251 (1999); *Jordan v. Nevada*, 121 Nev. 44, 74-75, 110 P.3d 30, 51 (Nev. 2005)
 23 (conspiracy requires a "combination of two or more persons who, by some concerted action, intend
 24 to accomplish an unlawful objective"), abrogated on other grounds by *Buzz Stew, LLC v. City of*
 25 *North Las Vegas*, 181 P.3d 670 (Nev. 2008).

26 The essence of a conspiracy claim is the "agreement between the tortfeasors, whether explicit
 27 or tacit." *In re Koonce*, 262 B.R. 850, 861 (Bankr. D. Nev. 2001). To plead an adequate claim of
 28

1 conspiracy to commit a tort, the plaintiff cannot simply state that a conspiracy exists. *Iqbal*, 129 S.
2 Ct. at 1950 ("While legal conclusions can provide the complaint's framework, they must be
3 supported by factual allegations."). Indeed, in civil conspiracy actions, the complaint must comply
4 with the heightened pleading standard set forth in Fed. R. Civ. P. 9(b) and allege facts such as a
5 "specific time, place, or person involved in the alleged conspiracies to give a defendant seeking to
6 respond to allegations of a conspiracy an idea of where to begin." *Kendall v. Visa U.S.A., Inc.*, 518
7 F.3d 1042, 1047 (9th Cir. 2008).

8 Plaintiff alleges that Defendants "formed an association to conspire to deprive Plaintiff of his
9 property through fraud and misrepresentation that would result in Plaintiff entering into loan
10 agreements for which he was ultimately not qualified," that "Defendants intended that the Plaintiffs'
11 [sic] loan would be packaged with other loans and sold on the secondary market," that "Defendants
12 acted in a concerted manner to target Plaintiff as borrower, to misrepresent the loan terms and/or to
13 misrepresent Plaintiff's qualification for the loans," that "Defendants . . . willfully and knowing[ly]
14 conspire[d] and agree[d] among themselves to engage in a conspiracy to promote, encourage,
15 facilitate, and actively engage in fraudulent and predatory lending practices . . . in participating in the
16 MERS system," and that "the defendant conspirators, through the creation of MERS . . . adopted and
17 implemented residential lending guidelines for use in Nevada and other states which were intended
18 to, and did, generate unprecedented profits . . . at the expense of the Plaintiff and other persons who
19 were fraudulently induced by the Defendant conspirators . . . into taking out loans that were known. .
20 . . were likely to result in foreclosure of the loans." See Compl., ¶¶ 51, 52, 59, 65, and 71. These
21 allegations are inadequate under Fed. R. Civ. P. 9(b). In particular, Plaintiff does not allege facts
22 showing the requisite details under Rule 9(b) for a fraud-based conspiracy claim—"the who, what,
23 when, where, and how" of the conspiracy. See *Vess v. Ciba-Geigy Corp.*, 317 F.3d 1097, 1106 (9th
24 Cir. 2003) (internal quotation omitted).

25 Plaintiff has not alleged sufficient facts to show the existence of any illegal agreement among
26 the BAC Defendants—rather, Plaintiff baldly and repeatedly asserts that some nefarious conspiracy
27 exists. "[A] conclusory allegation of agreement at some unidentified point does not supply facts
28

adequate to show illegality. . . . [W]ithout some further factual enhancement it stops short of the line between possibility and plausibility of entitlement to relief." *Twombly*, 550 U.S. at 557 (internal quotation omitted); *see also Kendall*, 518 F.3d at 1047-48 (affirming dismissal of conspiracy claim because the plaintiffs "pleaded only ultimate facts, such as conspiracy, and legal conclusions . . . [but] failed to plead the necessary evidentiary facts to support those conclusions"); *Duncan*, No. 3:09-cv-00632-RCJ-VPC, slip op. at 9-10 (dismissing civil conspiracy claim where plaintiffs did not allege an agreement); *Sieben*, No. 3:09-cv-00642-RCJ-VPC, slip op. at 9 (same). On this basis alone Plaintiff's conspiracy claim warrants dismissal.

2. Plaintiff Fails To Plead An Actionable Underlying Tort

Mere allegations of conspiracy are insufficient to state a conspiracy claim under Nevada law. Again, civil conspiracy is a way to hold other parties liable for an underlying tort, not a stand-alone claim. *Paul Steelman Ltd.*, 2007 WL 295610, at *3. Accordingly, Plaintiff cannot recover on his conspiracy claim without alleging the existence of an actionable underlying tort.

Here, Plaintiff makes not effort to, nor could he, state a fraud claim. Moreover, and as stated above, Plaintiff has not and cannot state a claim for wrongful foreclosure. Consequently, Plaintiff has failed to adequately allege the existence of an actionable underlying tort on which the conspiracy claim could be premised. Plaintiff's conspiracy claim requires dismissal with prejudice.

3. Courts Have Rejected Plaintiff's Attacks on MERS

Finally, the primary premise of Plaintiff's conspiracy claim—that the BAC Defendants' use of and membership in MERS is illegal—is simply wrong and unsupported.¹⁰ Indeed, Plaintiff's assertion that MERS is unlawful has been repeatedly rejected by courts nationwide. In *Cervantes*, the District of Arizona noted that "[the] Plaintiffs . . . have not directed this Court to any Arizona case that finds that the MERS system is fraudulent." *Cervantes*, 2009 WL 3157160, at *10. Likewise, although frequently presented with this argument, no Nevada court has held that MERS and its members are engaged in any sort of fraudulent conspiracy. To the contrary, multiple judges

¹⁰ Plaintiff unconvincingly asserts that the Defendants created and utilized MERS to advance unlawful lending practices. *See* Compl. ¶ 71. This allegation is wholly nonsensical, as MERS does not engage in any lending activities.

1 in the Nevada federal courts¹¹ and state courts¹² have had no difficulty holding that MERS has
 2 standing to foreclose and have approved MERS' role as a nominal beneficiary or mortgagee under a
 3 mortgage instrument. This should be particularly true where, as here, MERS' role was plainly
 4 disclosed in the Foreclosing Deed of Trust that Plaintiff signed.¹³

5 As a final note, the *Cervantes* Court explained that even if Plaintiff was somehow correct in
 6 his fanciful allegation that MERS is a "sham," his claim would still be defective:

7 Plaintiffs have failed to allege what effect, if any, listing the MERS system
 8 as a 'sham' beneficiary on the deed of trust had upon their obligations as
 9 borrowers. . . Plaintiffs do not allege that they were somehow induced to
 10 enter into their loans on the basis that MERS was a genuine and not a
 'sham' beneficiary.

11 *Cervantes*, 2009 WL 3157160, at *10. In this case, Plaintiff likewise does not allege that he was
 12 "somehow induced" to enter into his loan on the basis that MERS was "genuine." *See* Compl. ¶ 70.
 13 Thus, the same result reached in *Cervantes* should be reached here. In addition, the District of

14
 15 ¹¹ *Vasquez v. Aurora Loan Servs.*, Case No 2:08-cv-01800, slip op. at 2 (D. Nev. Apr. 21, 2009) (**Exhibit S**)
 16 (holding that the loan documents sufficiently demonstrated standing by Defendants, including MERS, "with respect to
 17 the loan and the foreclosure"); *Orzoff v. Mortg. Elec. Reg. Sys., Inc.*, Case No. 2:08-cv-01512, slip op. at 9-10 (D. Nev.
 18 Mar. 26, 2009) (**Exhibit T**) ("MERS does have standing [to participate in foreclosure proceedings as a nominee
 19 beneficiary]. . . Courts around the country have held the same."); *Gonzalez v. Home Am. Mortg. Corp.*, Case No. 2:09-
 20 cv-00244, slip op. at 7-9 (D. Nev. Mar. 12, 2009) (**Exhibit U**) (upholding right of MERS and CR Title, as successor
 trustee, to initiate non-judicial foreclosure without presenting the note); *Ramos v. MERS, Inc.*, Case No. 2:08-cv-1089-
 ECR-RJJ, 2009 WL 5651132, at *3 (D. Nev. Mar. 5, 2009) ("[U]nder the deed of trust, MERS was empowered to
 21 foreclose on the property and to appoint [another defendant] as substitute trustee for purpose of conducting the
 22 foreclosure."); *Elias v. HomeEq Serv.*, No. 2:08-CV-1836 JCM (PAL), 2009 WL 481270, at *1 (D. Nev. Feb. 25, 2009)
 (same).

23 ¹² *Khalil v. Fidelity Nat'l Default Sol. Tustin*, Case No. A560582, slip. op. at 3 (Dist. Ct. Clark County Nov. 24,
 24 2008) (**Exhibit V**) (recognizing that "MERS, as a lender's nominee and the named beneficiary [on the Deeds of Trust],
 25 ha[d] standing to foreclose").

26 ¹³ The Foreclosing Deed of Trust lists MERS as the beneficiary and nominee of the lender. *See* Ex. K, p. 2.
 27 The Foreclosing Deed of Trust also states:

28 Borrower understands and agrees that MERS holds only legal title to the interests
 granted by Borrower in this Security Instrument, but, if necessary to comply with
 law or custom, MERS (as nominee for Lender and Lender's successor and assigns)
 has the right: to exercise any or all of those interests, including, but not limited to,
 the right to foreclose and sell the Property; and to take any action required of Lender
 including, but not limited to, releasing and canceling this Security Instrument.

Ex. K, p. 3-4. The Foreclosing Deed of Trust permits the lender to appoint a substitute trustee thereunder. *See Id.* ¶ 24.
 Further, the Foreclosing Deed of Trust allows the lender to foreclose on the property if Plaintiff does not make his loan
 payments. *Id.* ¶ 22. Plaintiff agreed to the foregoing terms and should be held thereto.

1 Arizona rejected the idea that MERS is a "sham" beneficiary:

2 [T]he Court fails to see how the MERS system commits a fraud upon
 3 Plaintiff. Plaintiff's argument that MERS is a 'sham' beneficiary is
 4 unconvincing. Otherwise, any situation where a beneficiary obtains less
 5 than the full rights possessed by the entity or person granting the
 6 beneficiary status would likewise result in a 'sham' beneficiary. The fact
 7 that MERS does not obtain such rights as to collect mortgage payments or
 8 obtain legal title to the property in the event of non-payment does not
 9 transform MERS' status into a 'sham.'

10 *Cervantes*, 2009 WL 3157160, at *10. Again, Plaintiff makes no allegations in this lawsuit that
 11 would alter the *Cervantes* Court's commonsense and appropriate conclusion. Nothing that Plaintiff
 12 alleges about MERS and its activities constitutes fraud, nor can Plaintiff establish that the BAC
 13 Defendants engaged in unfair lending practices, let alone conspired to engage in such unfair lending
 14 practices. The Court should dismiss the Fourth and Fifth Causes of Action.

15 **F. Inspection and Accounting Is Not a Recognized Cause of Action in Nevada**

16 Plaintiff's Sixth Cause of Action purports to be for inspection and accounting. This is not a
 17 recognized cause of action in Nevada and requires dismissal on that basis. In making this claim,
 18 Plaintiff seemingly seeks information regarding the servicing of his loan. If Plaintiff has specific
 19 questions about the servicing of his loan, he should seek that information in the manner allowed
 20 under federal law. However, inspection and accounting is not a cause of action, thus requiring
 21 dismissal of that claim with prejudice.¹⁴

22 **G. Plaintiff's Unjust Enrichment Claim Is Barred by the Written Agreements**

23 Plaintiff's Seventh Cause of Action purports to state a claim for unjust enrichment. *See*
 24 *Compl.* ¶¶ 90-94. This claim, however, fails as a matter of law. Indeed, it is well-established that no
 25 unjust enrichment claim can exist where there is a contract, such as a mortgage, governing the
 26 relationship between the parties.

27 As the Nevada Supreme Court has held: "An action based on a theory of unjust enrichment

28 ¹⁴ In making his purported inspection and accounting claim, Plaintiff may be attempting to assert a claim under
 RESPA. Indeed, Plaintiff maintains that he requested, but was not provided, certain information regarding the servicing
 of his loan. *See Compl.* ¶¶ 84-85. Even if Plaintiff had pled a RESPA claim, which he did not, the foregoing allegations
 could not plausibly state a RESPA cause of action. Indeed, Plaintiff wholly fails to allege that he requested specific
 information via a Qualified Written Request under 12 U.S.C. 2605.

is not available when there is an express, written contract, because no agreement can be implied when there is an express agreement." *Leasepartners Corp. v. Robert L. Brooks Trust*, 942 P.2d 182, 187 (Nev. 1997) (per curiam). The doctrine of unjust enrichment thus only "applies to situations where there is no legal contract but where the person sought to be charged is in possession of money or property which in good conscience and justice he should not retain but should deliver to another [or should pay for]." *Id.* (quoting 66 AM. JUR. 2D RESTITUTION § 11 (1973)).

In the Complaint, Plaintiff admits that he entered into an express contract when he executed the deed of trust and note in connection with his loan. *See* Compl., ¶ 2. This Court has held that the existence of such contracts—including deeds of trust and notes—bars a plaintiff's claim for unjust enrichment. *See Hearne*, 3:08-CV-0500-ECR-RAM, slip op. at 10-11 ("Plaintiff's mortgages are express and written contracts; Plaintiff's [unjust enrichment] claim thus fails and will be dismissed."); *Lopez*, Case No. 3:09-cv-180, slip op. at 14-15 (dismissing Plaintiff's claims for unjust enrichment because the mortgages in question "are express and written contracts"); *Green*, Case No. 3:09-cv-374, slip op. at 6 (holding that "mortgages are express and written contracts; the doctrine of unjust enrichment therefore does not apply"); *Goodwin*, 2010 WL 234786, at *7-8 (D. Nev. 2010) (same).¹⁵ Thus, Plaintiff has not stated a cognizable claim for unjust enrichment.

H. Quiet Title is Not Appropriate Where Plaintiff Admits He Encumbered The Property

In his Eighth Cause of Action, Plaintiff seeks to quiet title. Plaintiff's quiet title claim should be dismissed because it is dependent on his other failed claims. But even if his other claims did not fail, quieting title is not a proper remedy in this case. "A quiet title claim requires a plaintiff to allege that the defendant is unlawfully asserting an adverse claim to title to real property." *Kemberling v. Ocwen Loan Servicing, LLC*, Case No. 2:09-cv-00567, 2009 WL 5039495, at *2 (D. Nev. Dec. 15, 2009). "The very object of the proceeding assumes that there are other claimants adverse to the Plaintiff, setting up titles and interests in the land or other subject-matter hostile to his [own]." *See Clay v. Scheeline Banking & Trust Co.*, 40 Nev. 9, 16, 159 P. 1081, 1082 (1916).

¹⁵ Numerous other Nevada courts have reached the same conclusion. *See, e.g., Crockett Myers v. Napier, Fitzgerald & Kirby*, 440 F. Supp. 2d 1184, 1197 (D. Nev. 2006); *Clark v. Metro. Life Ins. Co.*, Case No. 3:08-cv-158-LRH-VPC, 2009 WL 536830, at *6 (D. Nev. Mar. 3, 2009).

Where such adverse claims exist, the party seeking to have another party's right to property extinguished, bears the burden of overcoming the "presumption in favor of the record titleholder." *See Breliant v. Preferred Corp.*, 112 Nev. 663, 669, 918 P.2d 314, 318 (1996); *see Clay*, 40 Nev. at 16, 159 P. at 1082.

Here, Plaintiff admits he borrowed money, and then secured the loan with a deed of trust. *See, e.g.*, Compl. ¶ 2. Plaintiff's Foreclosing Deed of Trust on the property describes MERS' role as beneficiary and nominee of the lender. *See Ex. K*, ¶ 24. There is no other party claiming any interest in Plaintiff's property that is adverse to Plaintiff's title and/or the Foreclosing Deed of Trust. Plaintiff's dislike for the deed of trust he executed does not create an adverse claim that entitles him to an order quieting title.¹⁶

The only way this quiet title action would be necessary is if there was presently a dispute

¹⁶ While Plaintiff does not make a slander of title claim, he alleges in his quiet title claim that the Notice of Default constituted a libel of title. *See* Compl. ¶ 97. Even if Plaintiff had properly pled a slander of title claim, that claim would fail. To state a slander of title claim, Plaintiff must allege a "false and malicious communication, disparaging to [his] title in land, and causing special damage." *See Exec. Mgmt., Ltd. v. Ticor Title Ins. Co.*, 114 Nev. 823, 842, 963 P.2d 465, 478 (1998); *Higgins v. Higgins*, 103 Nev. 443, 445, 744 P.2d 530, 531 (1987) (internal citations omitted). Plaintiff cannot validly allege the foregoing as he seemingly admits his default under the note. *See* Compl. ¶ 90 ("Said payments would be paid when the note went into default as set forth above."). In *Ramos v. Mortgage Electronic Registrations System, Inc.*, the plaintiffs alleged that recorded notices of default slandered their title. 2009 WL 5651132. This Court dismissed that claim, noting:

Plaintiffs do not dispute that they were in default on their loan. Nor is it false that the property was to be sold at a trustee's sale. As noted above, Defendants were acting within their authority under the Deed of Trust in conducting the foreclosure. It is not clear, therefore, what Plaintiffs might assert to be false or malicious about the recorded notice. We conclude that Plaintiffs have failed to state a claim for slander of title.

2009 WL 5651132, at *4; *see also Saterbak v. MTC Fin. Inc.*, 2011 WL 484300, 2009 WL 5651132, slip op. (D. Nev. Feb. 4, 2011) (dismissing slander of title claim arising from recordation of notice of default because the trustee had the authority to initiate the foreclosure process and because Plaintiff never alleged that she was not in default). Courts throughout the Ninth Circuit have embraced similar reasoning. *See In re: MERS Litigation*, MDL Docket No. 09-2119-JAT, 2010 WL 4038788 (D. Ariz. Sept. 30, 2010) ("Plaintiffs bring claims for slander of title . . . on the allegation that certain defendants wrongfully recorded notices of default and intent to foreclose against Plaintiffs' property. . . . Here, Plaintiffs have not sufficiently alleged the falsity of these communications. . . . [because] there is no allegation that Plaintiffs were not in default or that a trustee's sale was actually not scheduled. The only alleged falsity emerges from Plaintiffs' argument that the MERS recordation process splits the note from the deed of trust, renders the note unenforceable, and thus all subsequent action-including these recordations-are invalid and false."). Here, as in *Ramos*, *Saterbak*, and *In Re: MERS Litigation*, Plaintiff does not meaningfully deny his default under the note, but merely implies that the BAC Defendants are not entitled to collect on Plaintiff's loan. Thus, any purported slander of title claim fails.

1 between two or more parties over the right to foreclose under Plaintiff's Foreclosing Deed of Trust.
2 Plaintiff does not assert that more than one entity claims the right to foreclose on the Foreclosing
3 Deed of Trust, so Plaintiff's claim to quiet title has no merit.

4 Further, because an action to quiet title is equitable in nature, *see MacDonald v. Krause*, 77
5 Nev. 312, 317-18, 362 P.2d 724 (1961), Plaintiff must show his right to such equitable relief. *See*
6 *Transaero Land & Dev. Co. v. Land Title Co. of Nev., Inc.*, 108 Nev. 997, 1001, 842 P.2d 716
7 (1992) ("[I]n seeking equity, a party is required to do equity.") (internal quotation omitted). In this
8 case, Plaintiff voluntarily executed a promissory note and the Foreclosing Deed of Trust. He has
9 failed to make the payments due on the loan, and now seeks to deprive his creditors of their security
10 by quieting title. This would be an inequitable result. Where a defaulting mortgagor or trustor
11 attempts to quiet title against the mortgagee, equity is served by requiring the debtor purporting to
12 quiet title to pay the full amount of the outstanding debt. *See, e.g., Trusty v. Ray*, 249 P.2d 814
13 (Idaho 1951); *see also Mix v. Sodd*, 126 Cal. App. 3d 386, 390 (1981) (no quiet title action may lie
14 without paying the debt, even if debt is otherwise unenforceable). This Court should reject
15 Plaintiff's attempt to obtain a windfall from his loan by eliminating the deed of trust. Plaintiff's quiet
16 title claim should be dismissed.

17 **I. Plaintiff's Breach of Good Faith and Fair Dealing Claim Is Baseless**

18 Plaintiff's Ninth Cause of Action is for Breach of Good Faith and Fair Dealing. This claim is
19 devoid of merit. A claim for breach of the covenant of good faith and fair dealing requires the
20 following: (1) Plaintiff and BAC Defendants were parties to a contract; (2) BAC Defendants owed a
21 duty of good faith to Plaintiff; (3) BAC Defendants breached that duty by performing in manner that
22 was unfaithful to the purpose of the contract; and (4) Plaintiff's justified expectations were denied.
23 *See Perry v. Jordan*, 111 Nev. 943, 948, 900 P.2d 335, 338 (1995). The implied duty of good faith
24 and fair dealing arises in all contracts. *See A.C. Shaw Constr. v. Washoe County*, 105 Nev. 913, 914,
25 734 P.2d 9 (1989). However, to be actionable, the breach must have occurred after the formation of
26 the contract, not before. *See Centerville Builders, Inc., v. Wynne*, 683 A.2d 1340, 1342 (R.I. 1996)
27 (holding that the covenant of good faith and fair dealing "only applies after a binding contract is
28

1 formed") (citing *Crellin Techs., Inc. v. Equipmentlease Corp.*, 18 F.3d 1, 10 (1st Cir. 1994)).

2 At the outset, Plaintiff alleges that "Defendants had a duty to pay at least as much
3 consideration to plaintiff's financial interests as their own financial interests" and that "Defendants
4 had a duty to comply with all applicable laws of the State of Nevada and published HAMP
5 guidelines and requirements under the HAMP contracts." See Compl. ¶ 101. Plaintiff's first
6 assertion is flawed as a matter of law, as it is well-settled (including in multiple decisions from this
7 District) that a lender or servicer owes no fiduciary duties to mortgage borrowers. *Reed v.*
8 *Countrywide Bank*, FSB, Case No. 2:09-cv-00319, slip op. at 5, 6 (D. Nev. Mar. 23, 2009)
9 (mortgage lender owes no fiduciary duty to borrower, and no "exceptional circumstances" exist in
10 such a situation to give rise to a "special relationship") (attached at **Exhibit W**); *Hoskins v.*
11 *Countrywide Home Loans*, Case No. 2:09-cv-00166, slip op. at 2 (D. Nev. Mar. 18, 2009) (no
12 fiduciary duty between loan servicer and borrower) (attached as **Exhibit X**); *Yerington Ford, Inc., v.*
13 *GMAC*, 359 F. Supp. 2d 1075, 1089 (D. Nev. 2004), overruled on other grounds by *Giles v. GMAC*,
14 494 F.3d 865 (9th Cir. 2007); *Kwok v. CR Title Co., et al.*, Case No. 2:09-cv-2298, slip op. at 5 (D.
15 Nev. Jun. 23, 2010) (Hunt, R.) ("[A] lender owes no fiduciary duties to a borrower absent
16 exceptional circumstances.") (attached as **Exhibit Y**); *Saniel v. CR Title Co., et al.*, Case No. 2:09-
17 cv-02290, slip op. at 5 (D. Nev., Jun. 23, 2010) (Hunt, R.) (attached as **Exhibit Z**).

18 Plaintiff goes on to allege that the BAC Defendants breached the duty of good faith and fair
19 dealing by "[f]ailing to negotiate with Plaintiffs [sic] in good faith, after Plaintiffs requested
20 mortgage payment assistance under HAMP," "[f]ailing to properly identify whether borrowers meet
21 the minimum HAMP eligibility requirements . . . failing to offer modifications as required by HAMP
22 . . . [f]ailing to notify borrowers in writing of their determinations regarding the eligibility for
23 mortgage modifications and the reasons for those determinations . . . [initiating] new foreclosure
24 actions or continuing foreclosure actions that had previously been commenced against borrowers
25 who meet the minimum HAMP eligibility criteria . . . [f]ailing to suspend temporarily foreclosure
26 actions while borrowers who are not entitled to mortgage modifications are considered for
27 alternative prevention options . . . [and by f]ailing to attend mediation with 'true standing' to
28

1 represent alleged lender parties under Nevada's foreclosure mediation program."¹⁷ See Compl. ¶
 2 102. Plaintiff further alleges that Defendants breached the implied covenant of good faith and fair
 3 dealing by concealing the true terms of the loan, failing to explain that Plaintiff was not truly
 4 qualified for his loan, and misrepresenting Plaintiff's ability to qualify for the loan. See Compl. ¶¶
 5 103-05.¹⁸ These allegations do not support a breach of the implied covenant of good faith and fair
 6 dealing claim.¹⁹

7 Plaintiff's breach of the implied covenant of good faith and fair dealing claim necessarily
 8 fails against ReconTrust and MERSCORP, as Plaintiff is not a party to a contract with either entity.
 9 In the absence of a contractual relationship, a party cannot be liable for breaching the implied
 10 covenant of good faith and fair dealing. See, e.g., *Velasquez*, 2009 WL 2338852, at *9 (dismissing
 11 implied covenant claim in part because facts showed no contractual relationship).

12 Moreover, Plaintiff cannot show that any of the BAC Defendants breached the implied
 13 covenant of good faith and fair dealing by luring Plaintiff into the subject loan. Prior to the
 14 formation of a contract, there is no implied duty of good faith and fair dealing. Even if a party could
 15 be liable for breaching the implied contractual covenant before formation of the contract, **the BAC**
 16 **Defendants played no part in any of the pre-contract negotiations.**

17 ¹⁷ The majority of the foregoing allegations do not apply to Plaintiff in particular. Rather, they seemingly
 18 allege widespread misconduct by the BAC Defendants, which Plaintiff does not have standing to challenge on behalf of
 19 unknown and unnamed borrowers. Moreover, Plaintiff makes general assertions about Defendants' alleged failure to
 20 appear at Nevada foreclosure mediations with authority and in good faith. If Plaintiff participated in a foreclosure
 21 mediation and would like to have its outcome reviewed, he must bring a petition for judicial review. Indeed, the
 Amended Foreclosure Mediation Rules ("AFMR") expressly provide that the content of Nevada foreclosure mediations
 is confidential and inadmissible in subsequent proceedings, except in a petition for judicial review properly commenced
 under the AFMR. See AFMR 19. Any reference to foreclosure mediations is improper and should be stricken.

22 ¹⁸ Plaintiff also appears to contend that the BAC Defendants violated the federal Truth in Lending Act
 ("TILA") by, *inter alia*, failing to disclose material and true terms of the transaction. See Compl. ¶¶ 104, 107. Plaintiff,
 23 however, has failed to plead a cause of action under TILA. Even if Plaintiff had attempted to state a cause of action
 24 under TILA, any TILA claim is time-barred, as TILA contains a one year statute of limitations for damages claims, see
 15 U.S.C. § 1640(e), and a three year statute of limitations for rescission claims. See 15 U.S.C. § 1635(f) (The right of
 25 rescission pursuant to TILA "shall expire three years after the date of consummation of the transaction or upon the sale
 of the property, whichever occurs first. . ."). Thus, Plaintiff was required to file any TILA damages claim against the
 BAC Defendants by May of 2005, and any rescission claim by May 2007.

26 ¹⁹ Plaintiff also alleges that the BAC Defendants breached the duty of good faith and fair dealing by failing to
 27 explain that they had no right to foreclose or collect under the note. See Compl. ¶ 107. As set forth in the preceding
 28 sections, BAC was the duly authorized servicer of the loan, and the foreclosure at issue has been wholly proper thus far.
 Plaintiff's contention that the BAC Defendants breached the implied covenant of good faith and fair dealing by failing to
 inform Plaintiff that they had no right to foreclose is legally baseless and, in light of the propriety of the subject
 foreclosure, nonsensical.

Further, Plaintiff pleads no facts that, if proven, would establish that BAC Defendants contravened the spirit of the contract. While Plaintiff apparently believes that the BAC Defendants breached the duty of good faith and fair dealing by allegedly failing to review him for HAMP or otherwise comply with HAMP guidelines, Plaintiff cannot make this claim as a matter of law because there is no private right of action under HAMP. *Manabat*, 2010 WL 2574161, slip op. at 11. Notably, at least two courts in this District have concluded that a borrower does not have standing to sue for an alleged breach of HAMP. *See Sena v. Bank of America Home Loans, et al.*, 2:10-CV-00947-KJD-LRL, slip. op. at 5 (D. Nev. March 30, 2011) (attached as **Exhibit aa**); *Vasquez*, 2:10-cv-00116-PMP-RJJ, Slip Op. at 2; *see also Benito*, Case No. 2:09-CV-1218-PMP-PAL. Similarly, case law in other jurisdictions uniformly holds that borrowers cannot sue participating mortgage servicers on the theory that they are intended beneficiaries under the HAMP participation agreements. *See Burtzos*, 2010 WL 2196068, at *2; *Escobedo*, 2009 WL 4981618; *Mugica*, 2009 WL 3467750, at *3; *Kamp*, 2009 WL 3177636, at *4 (C.D. Cal. Oct. 1, 2009) (stating that argument that borrowers have rights under HAMP participation agreements is "nonsensical and baseless."); *Small*, 2010 WL 835462.

Even if Plaintiff had standing to sue under HAMP, his HAMP arguments would warrant dismissal. Indeed, Plaintiff's HAMP arguments contain little more than rote, conclusory statements and are devoid of details specific to the transaction at issue. Notably, Plaintiff does not allege, even generally, that he was qualified for HAMP, that he submitted documentation to be analyzed for HAMP, or that he even desires a HAMP modification. Lenders owe no duty to automatically grant borrowers a loan modification, *see, e.g., Sam v. Am. Home Mortg. Servicing, Inc.*, Case No. 2:09-cv-2177, 2010 WL 761228, at *6 (E.D. Cal. March 3, 2010), and Plaintiff does not and cannot explain why he met the criteria for modification assistance in this case.

Plaintiff has failed to state a breach of the implied covenant of good faith and fair dealing claim upon which relief can be granted. Indeed, Plaintiff's breach of the implied covenant of good faith and fair dealing claim is based upon allegations that Plaintiff has no standing to make and/or legal duties that simply do not exist under Nevada law. That claim warrants dismissal with

1 prejudice.

2 **J. The "Claims" for Injunctive Relief, Declaratory Relief, and Rescission Fail as a Matter**
3 **of Law**

4 Plaintiff's Tenth, Eleventh and Twelfth Causes of Action for injunctive relief, declaratory
5 relief, and rescission fail for two reasons. First, as this Court has previously recognized, each of
6 these "claims" is actually a remedy, and not a cause of action that states a legal claim. *Aguilar*, 2010
7 WL 185951, at *4; *Goodwin*, 3:09-cv-00306-ECR, slip op. at 10 (injunctive and declaratory relief);
8 *Dalton*, No. 3:09-cv-00534-LDG-VPC (injunctive and declaratory relief). For that reason alone,
9 each "claim" should be dismissed. *See also Josephson v. EMC Mortg. Corp.*, No. 2:10-CV-336
10 JCM (PAL), 2010 WL 4810715, at *3 (D. Nev. Nov. 19, 2010) ("[I]t is well established that
11 injunctive relief is a remedy, and not an independent cause of action . . . Declaratory relief is a form
12 of relief which is not intended to furnish the plaintiffs with a second cause of action for the
13 determination of identical issues.") (internal citations and modifications omitted).

14 Second, these "claims" are entirely derivative of Plaintiff's other causes of action. Because
15 those causes of action fail for all of the reasons explained above, so too do Plaintiff's claims for
16 injunctive relief, declaratory relief and rescission. *See Duncan*, No. 3:09-cv-00632-RCJ-VPC, slip
17 op. at 9 ("Because the underlying causes of action will be dismissed, these causes of action will also
18 be dismissed."); *Sieben*, No. 3:09-cv-00642-RCJ-VPC, slip op. at 9 (same).²⁰

21 ²⁰ In his Declaratory Relief claim, Plaintiff appears to contend that the BAC Defendants violated TILA. *See*
22 Compl. ¶ 119. Plaintiff, however, has failed to plead a cause of action under TILA. Even if Plaintiff had attempted to
23 state a cause of action under TILA, that claim would fail for several reasons. First, none of the BAC Defendants was
24 Plaintiff's lender. As a result, any claims that Plaintiff attempts to state against the BAC Defendants regarding alleged
25 TILA violations at origination of the loan are misplaced, particularly where there is no alleged basis for finding assignee
26 liability. Second, any TILA claim is time-barred. TILA contains a one year statute of limitations for damages claims.
27 *See* 15 U.S.C. § 1640(e) ("Any action under this section may be brought in any United States district court . . . within one
28 year from the date of the occurrence of the violation."). "The date of the violation refers to the date 'the loan documents
were signed.'" *Lynch v. RKS Mortg. Inc.*, 588 F. Supp. 2d 1254, 1259 (E.D. Cal. 2008) (quoting *Meyer v. Ameriquest
Mortgage Co.*, 342 F.3d 899, 902 (9th Cir. 2003)). TILA also contains a three year statute of limitations for rescission
claims. *See* 15 U.S.C. § 1635(f) (The right of rescission pursuant to TILA "shall expire three years after the date of
consummation of the transaction or upon the sale of the property, whichever occurs first. . . ."). Thus, Plaintiff was
required to file any TILA damages claim against the BAC Defendants by May of 2005, and any rescission claim by May
2007.

V.

CONCLUSION

For the reasons stated above, the BAC Defendants request that this Court dismiss each of Plaintiff's claims and the Complaint with prejudice. Further, BAC Defendants also request that this Court issue an order expunging the *lis pendens* that Plaintiff recorded in connection with this lawsuit.

DATED this 13th day of April, 2011.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on the 13th day of April, 2011 and pursuant to FRCP 5, I served via CM/ECF and/or deposited for mailing in the U.S. Mail a true and correct copy of the foregoing **MOTION TO DISMISS**, postage prepaid and addressed to:

MARK A. ADAIR
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Plaintiff in pro per

/s/ Elizabeth Stessel
An employee of AKERMAN SENTERFITT LLP

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